United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1435

B

P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1435

UNITED STATES OF AMERICA,

Appellee,

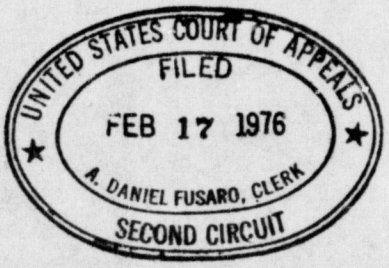
—vs.—

LAM LEK CHONG, a/k/a JIMMY LAM, YUK CHOI CHUNG, a/k/a DAVID CHAN and FRANCISCO LIGANOZA,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF IN BEHALF OF APPELLANT LAM LEK CHONG



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INDEX

	Page
Table of Authorities	iv
Questions Presented for Review	2
Statement of Facts	4
1. The Indictment	4
2. "Fat Guy" Transaction - January 30, 1974	6
3. The Hong Kong Venture	6
4. The Apartment Transaction - May 30, 1974	10
5. Court Proceedings	10
Argument	12
POINT I - The Government's Proof and Arguments With Respect to Other Crimes Constituted a Fatal Variance From the Charge of the Indictment. One Such Crime was Charged Against a Co-Defendant as a Substantive Offense and the Defendant Lam's Motion to Sever that Count Should Have Been Granted. Moreover, the Government Repeatedly Argued to the Jury that the Defendant Had Committed Additional Such Crimes Which Were Not Even the Subjects of Trial Proof.	
The Court Compounded the Error When It Refused to Charge the Jury With Respect to: (1) Multiple Conspiracies; (2) The Limited Scope of the Conspiracy Charged by the Indictment (Importation of Heroin From Hong Kong and Distribution of That Heroin); and (3) the Defense of Fraudulent Intent	12
A. The Indictment Charged A Conspiracy Only With Respect to the Hong Kong Venture	12

Page

B. The Manner in Which the Issues Were Presented and Preserved 14

C. The References to Additional Other Crimes Not the Subject Of Proof 19

D. The Court's Refusal to Charge With Respect to Multiple Conspiracies 21

E. The Court's Refusal, in its Charge, to Pin the Conspiracy Count to the Hong Kong Importation 21

F. The Court's Refusal to Charge on the Fraud Issue 23

POINT II - The Conduct of the Prosecutor In Presenting the Case and in His Arguments to the Jury Deprived the Defendant of a Fair Trial and of His Right to Cross-Examine the Witnesses Against Him 31

POINT III - The Court Improperly Received in Evidence the Testimony of an Agent Who Claimed that He Received a Sample of Heroin in Hong Kong and That His Test of That Sample Showed it to be Heroin. The Sample was Not Produced in Court or Otherwise Made Available to the Defense, and the Agent Was Unqualified to Testify as to the Reliability of the Test or the Integrity of the Procedure He Followed 38

POINT IV - The Court Wrongfully Precluded the Defendant Lam From Introducing Into Evidence A Government Memorandum Which Established that, While in Hong Kong, Lam was Followed and was Not Observed to Meet with Any Narcotics Dealers 41

Page

POINT V - The Appellant Lam Adopts All Applicable Arguments Raised By the Briefs of the Co-Appellants 43

Conclusion 43

Table of Authorities

	Page
Cases:	
United States v. Bertolotti, - F. 2d - , (November 10, 1975), slip sheet ops. at 6409	30
United States v. Bivona, 487 F. 2d 443 (2d Cir., 1973)	38
United States v. Drummond, 481 F. 2d 62 (2d Cir., 1973)	38
United States v. Euphemia, 261 F. 2d 441 (2d Cir., 1958)	29
United States v. Feola, - U.S. - , 95 S.Ct. 1255, 43 L.Ed. 2d 541 (1975)	29
United States v. Kelly, 420 F. 2d 26 (2d Cir., 1969)	40
United States v. LaSorsa, 480 F. 2d 522 (2d Cir., 1973)	38
United States v. Sperling, 506 F. 2d 1323 (2d Cir., 1974)	26
United States v. Steele, 496 F. 2d 165 (10th Cir., 1972)	29
United States v. Thomas, 468 F. 2d 422 (10th Cir., 1972)	29
United States v. Torres, 519 F. 2d 723 (2d Cir., 1975)	29
United States v. Varelli, 407 F. 2d 735 (7th Cir.,1969)	28
United States v. White, 486 F. 2d 204 (2d Cir., 1973)	38
United States v. Zeehandelaar, 498 F. 2d 352 (2d Cir., 1974)	13

Page

United States Code:

21 U.S.C. § 812 4
21 U.S.C. § 841(a)(1) 4
21 U.S.C. § 841(b)(1)(A) 4
21 U.S.C. § 846 1
21 U.S.C. § 951(a)(1) 4
21 U.S.C. § 952(a) 4
21 U.S.C. § 960(a)(1) 4
21 U.S.C. § 960(b)(1) 4
21 U.S.C. § 963 1

Other Authorities:

Bernheim, Defense of Narcotics Cases (Matthew Bender, 1975 revision) § 402 40

UNITED STATES COURT OF APPEALS

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LAM LEK CHONG, a/k/a Jimmy Lam,
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and FRANCISCO LIGANOZA,

Defendants-Appellants.

On Appeal From The United States District Court
For The Southern District Of New York

BRIEF IN BEHALF OF APPELLANT LAM LEK CHONG

Lam Lek Chong, whose Americanized name is Jimmy Lam, appeals from a judgment of conviction entered against him in the Southern District of New York after a jury trial before the Honorable Charles Tenney, D.J. He was convicted upon one count of conspiracy to violate Federal narcotics laws (21 U.S.C. §§ 846, 963). He was

sentenced to a term of eight years imprisonment to be followed by three years of special parole and to be served concurrently with a fifteen year sentence of imprisonment imposed upon him by the New York State Supreme Court.

Questions Presented for Review

1. Did the trial proof, the prosecutor's tactics, and the deficiencies of the Court's charge to the jury deprive Lam of a fair trial with respect to the charge as to which he was indicted?

A. Did the government's trial proof and arguments with respect to other crimes constitute an impermissible and prejudicial variance from the charges of the indictment?

B. Should the Court have granted Lam's motion for a severance from the indictment of Count II which solely charged a co-defendant with a substantive narcotics offense?

C. Was Lam further prejudiced by government arguments to the jury that Lam had committed additional crimes which were not the subjects of trial proof?

D. Did the trial court err in refusing to charge the jury with respect to multiple conspiracies?

E. Did the trial court err in refusing to charge the jury with respect to the limited scope of

of the conspiracy charged by the indictment, thus permitting the jury to return a guilty verdict predicated upon other crimes? Conversely, did the Court err in specifically permitting the jury to convict Lam upon crimes not charged by the indictment?

F. Did the trial court err in refusing to charge the jury that a mere intent to defraud undercover agents would not satisfy the illegal objective requirement of the conspiracy charged by the indictment?

2. Was Lam deprived of a fair trial and of his right to cross-examine witnesses against him by a variety of tactics and arguments of the prosecutor?

3. Did the trial court err in receiving testimony concerning an allegedly scientific test for heroin, when the heroin specimen was not available for examination by the defense, since the agent left it in Hong Kong, and where the agent was admittedly unqualified to testify concerning the reliability of the test and concerning the propriety of his procedures?

4. Did the trial court err in refusing to permit defense counsel to place a critical exhibit in evidence where it was clear that the prior failure to do so had been an oversight?

Statement of Facts*

1. The Indictment.

The indictment was filed on August 21, 1974. It was in two counts. It charged that Lam, together with Yuk Choi Chung, a/k/a David Chan [hereinafter, "Chan"], and Francisco Li Ganoza [hereinafter, "Li"], conspired with each other and with "others to the grand jury unknown" to violate various sections of the Federal narcotics laws which prohibit importation, possession and distribution of controlled substances.**

With respect to the specific objective of the conspiracy, the indictment charged that the defendants sought to import into the United States from Hong Kong large quantities of heroin, "and to distribute, and possess with intent to distribute, said heroin within the United States ..." in violation of each of the aforesaid

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* The co-appellant Chan has filed an appendix with this Court containing the docket entries, the indictment and the Court's charge to the jury. These documents retain their original pagination. The transcript of proceedings in the Court below includes a pre-trial hearing (cited as "H." herein) and the trial (cited as "Tr." herein), each of which is separately paginated. Following receipt of the government's brief, counsel for appellant Lam will lodge a complete copy of these transcripts with the Clerk of this Court for the purpose of facilitating review.

** 21 U.S.C. § 812, 841(a)(1) and (b)(1)(A), 951(a)(1), 952(a), 960(a)(1) and (b)(1).

statutes.

The indictment listed five overt acts each of which specifically was keyed to "the importation and sale of heroin from Hong Kong." Thus, Overt Act No. 1 charged that on February 14, 1974, Lam met in a New York hotel with two persons (undercover agents) and negotiated for the importation and sale of heroin from Hong Kong. Overt Act No. 2 charged that on March 12, 1974, Lam introduced Chan to the two other persons (undercover agents) at a New York City hotel "and discussed with them the manner of importing heroin into the United States from Hong Kong." Overt Act No. 3 charged that in March and April, 1974, Lam, Chan and Li travelled from New York City to Hong Kong. Overt Act No. 4 charged that on April 21, 1974, Lam delivered a sample of heroin to two persons (undercover agents) at a Hong Kong hotel. Overt Act No. 5 charged that on April 22, 1974, Lam and Li went to a Hong Kong hotel and made arrangements to deliver heroin.*

Count II of the indictment charged that on May 30, 1974, the defendant Li distributed and possessed with intent to distribute a quantity of heroin. Neither of the other defendants was charged with that substantive offense.

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* It should be mentioned at this point that no heroin was ever imported into the United States as a result of the activities described in the indictment.

2. "Fat Guy" Transaction - January 30, 1974.

In January, 1974, Lam, a New York City travel agent, was approached by Frank Mingo, a New York City police officer who was acting in an undercover capacity in behalf of a Federal-State narcotics task force. Mingo, who did not disclose his true identity, portrayed himself as a wealthy, connected pimp and expressed an interest in making contact with a supplier of heroin (Tr. 152-165, 175).

Lam allegedly placed Mingo in touch with such a supplier ("Fat Guy", a/k/a Shark Fish, a/k/a Robert). Mingo, together with another undercover agent (Herbert Wright) commenced negotiating directly with the supplier and his associates (Tr. 165, 337-8). On January 30, 1974, Mingo and Wright acquired one and one-half pounds of heroin for $42,000 from the supplier (Tr. 167-9). There is no evidence that Lam exercised any control with respect to the terms and conditions of the sale or that he received any profits from the sale or that he was present at the time of delivery or that the narcotics in question were ever in his actual or constructive possession. Indeed, the officers testified to the contrary (Tr. 350, 818-821, 825).

3. The Hong Kong Venture.

While the undercover agents were negotiating for the aforementioned sale, and subsequent thereto, they held discussions with Lam concerning the possibility of

importing heroin from Hong Kong, where the purchase price was a fraction of the New York price (Tr. 153-4, 172). Lam did not offer to arrange such a transaction, but rather was only giving advice (Tr. 337). One issue at trial was whether the agents entrapped Lam into participating in such a plan. A second issue was whether Lam was, in fact, merely humoring or defrauding the undercover agents with the hope of receiving money from them (See, e.g., Tr. 269-271, 833), but without the intent or anticipation of actually placing them in contact with a Hong Kong heroin dealer.

Commencing with the first meeting on January 24, 1974, and continuing through to the beginning of April, 1974, the agents regularly contacted Lam, by telephone and in person, with respect to their desire to make a Hong Kong connection. Many of those telephone conversations and meetings were surreptitiously recorded by the agents. The scene depicted by those recordings is one of two money-flashing, black pimps driving expensive cars, cajoling, making thinly veiled threats, offering money and women, and placing increasing pressure on Lam to meet up to their expectations that he would be able to bring about a Hong Kong contact. On the other hand, Lam is shown to engage in continued back-pedaling, false starts, and conduct generally characteristic of one whose bluff is being called. (See: The government transcripts of the recordings received

in evidence. We request that the government provide this Court with copies of those transcripts. See also: Tr. 860-4).

There is no evidence that, prior to being taken over by the undercover agents, Lam ever engaged in a narcotics transaction. Indeed, in his recorded conversations with them, he admitted that this type of thing was new to him and he was only helping them because of their repeated requests (Tr. 364, 365-6, 372, 847, 899; conversation of March 5, 1974, pp. 20, 25, 32). On several occasions, he suggested to the agents that they go over to Hong Kong themselves, without him, in an effort to find a contact. On other occasions, he suggested that the agents, themselves, bring the heroin back to the United States.* Finally, the agents asked Lam if Lam knew anyone who was engaged in legitimate import trade with Hong Kong. They suggested that such a person might have the facility to smuggle heroin into the United States.** It was thus that Lam brought the co-defendant Chan into the picture. There is no evidence that Chan had ever previously engaged in any narcotics dealings.*** The back-pedaling, hemming and hawing continued.

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* See: Conversation of March 5, 1974, pp. 26, 35; Tr. 365-6, 852.

** Id. at pp. 29-30.

*** This is made clear in Chan's conversations, in Chinese, with Lam when they met with the undercover agents (transcript of March 12, 1974 meeting, pp. 24, 31 and of March 19, 1974 meeting, pp. 5, 20, 28, 31, 51, 88).

Chan spoke very little English. A revealing insight is presented by recorded conversations, in Chinese, between Lam and Chan, in the presence of the undercover agents - who did not understand Chinese. In these Chinese language conversations, Lam and Chan make clear that they have no experience in this sort of thing and that they do not, in fact, have a Hong Kong contact. Significantly, when Chan expressed these thoughts to Lam, in Chinese, Lam then would give an altogether different translation of Chan's words to the undercover agents.

In late March, 1974, Chan departed for Hong Kong, consistent with his previous legitimate business plans. On or about April 17, 1974, Lam arrived in Hong Kong as did the agents, who travelled separately from him (Tr. 645, 1310. In short, the trip came to nought as Lam's and Chan's back-pedaling continued and he made unsuccessful efforts to part the agents from their money. On April 22, Lam introduced the agents to the co-defendant Li who had independently come to Hong Kong to get married (Tr. 307, 1429-1441). On April 23 the undercover agents returned to New York (Tr. 875). Lam returned to New York on April 29 (Tr. 1310).*

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* During the stay in Hong Kong, a sample of heroin was allegedly delivered to the agents (Tr. 302). But see Point III, under our argument, infra, p. 38.

4. The Apartment Transaction - May 30, 1974.

On May 30, 1974, the agents again commenced repeated requests to Lam to place them in contact with a local source of heroin (Tr. 700). Discussions continued through to May 30, 1974, when Lam, in the absence of the co-defendant Li, brought Agent Mingo to Li's Manhattan apartment (Tr. 742, 775-798, 808-814, 1092-1131, 1249-1351, 1268-74, 1298). After a search of the apartment, Lam allegedly withdrew a package of 678 grams of heroin from a garbage can in the apartment. As Lam and the agent departed the building, other agents arrested Lam. Thereafter, the co-defendant Li was arrested in the vicinity (Id).

On August 20, 1974, Chan returned to the United States and was arrested at the airport.

5. Court Proceedings.

On August 29, 1974, the instant indictment was filed charging each of the three defendants with conspiracy to import heroin from Hong Kong and charging the defendant Li with a substantive offense with respect to the May 30, 1974 transaction.

In the interim, Lam, alone, was indicted in the New York Supreme Court with respect to the May 30, 1974 transaction. That case came to trial in New York County prior to the instant trial, and Lam was convicted. He received a sentence of fifteen years imprisonment.

Prior to the instant trial, the defendants filed motions for, inter alia, a severance of Count II from Count I and for hearings with respect to items

seized from Li's apartment following Lam's arrest and items seized from Lam's travel agency pursuant to subpeona. The motion for a severance was eventually denied. Although a hearing was held with respect to the various seizures, the issue was eventually rendered moot upon the government's representation that none of the items seized would be used in evidence (H. 1, et seq.).

Trial proceedings commenced on October 14, 1975 and the case was given to the jury at 12:10 P.M., November 10, 1975. At 4:30 P.M. on the next day, the jury returned a verdict of guilty as to the conspiracy count with respect to each of the defendants (Tr. 1838). After further deliberation, the jury announced it could not agree with respect to the substantive offense charged only against Li in Count II (Tr. 1842).

On December 18, 1975, the Court dismissed Count II upon motion of the government, and entered judgment against each of the three defendants. Lam was sentenced to eight years imprisonment to be followed by three years of special parole and to be served concurrently with his State sentence of fifteen years imprisonment. Li was sentence to seven years imprisonment to be followed by three years of special parole. Chan was sentenced to five years imprisonment, three months of which were to be served in a jail-type institution and four years nine months of which was to be served upon supervised probation (Tr. 1931-1950).

A R G U M E N T

POINT I

THE GOVERNMENT'S PROOF AND ARGUMENTS WITH RESPECT TO OTHER CRIMES CONSTITUTED A FATAL VARIANCE FROM THE CHARGE OF THE INDICTMENT. ONE SUCH CRIME WAS CHARGED AGAINST A CO-DEFENDANT AS A SUBSTANTIVE OFFENSE AND THE DEFENDANT LAM'S MOTION TO SEVER THAT COUNT SHOULD HAVE BEEN GRANTED. MOREOVER, THE GOVERNMENT REPEATEDLY ARGUED TO THE JURY THAT THE DEFENDANT HAD COMMITTED ADDITIONAL SUCH CRIMES WHICH WERE NOT EVEN THE SUBJECTS OF TRIAL PROOF.

THE COURT COMPOUNDED THE ERROR WHEN IT REFUSED TO CHARGE THE JURY WITH RESPECT TO: (1) MULTIPLE CONSPIRACIES; (2) THE LIMITED SCOPE OF THE CONSPIRACY CHARGED BY THE INDICTMENT (IMPORTATION OF HEROIN FROM HONG KONG AND DISTRIBUTION OF THAT HEROIN); AND (3) THE DEFENSE OF FRAUDULENT INTENT.

A. The Indictment Charged a Conspiracy Only With Respect To the Hong Kong Venture.

Lam was charged only in the first count of the indictment. Any rational reading of that count limits the alleged conspiracy to the Hong Kong venture. The first paragraph of the count merely sets forth the statutes which the defendants "and others to the grand jury unknown", conspired to violate. The second paragraph of Count I states as follows:

> "It was part of said conspiracy that the said defendants unlawfully, intentionally and knowingly would import into the United States from a place outside thereof, to wit, Hong Kong large quantities of heroin, a Schedule I narcotic drug controlled substance, the exact amounts thereof being to the grand jury unknown, and to distribute

> and possess with intent to distribute said heroin within the United States, in violation of Sections 812, 841(a)(1), 841(b)(1)(A), 951(a)(1), 952(a), 960 (a)(1) and 960(b)(1) of Title 21, United States Code." [Emphasis added].*

The remainder of Count I merely lists five overt acts, each of which is specifically keyed to the Hong Kong venture and in no way relates to any other criminal act.

It must be borne in mind that all of the activities which were the subjects of trial proof were witnessed by the two undercover agents. Those agents had direct dealings with the individuals who sold them heroin on January 30, 1974. Nevertheless, no evidence was presented to the grand jury concerning any events that had occurred prior to February 14, 1974 (Tr. 27). The grand jury knew nothing of the January 30 transaction.

In United States v. Zeehandelaar, 498 F. 2d 352 at 356, this Court articulated the rationale upon which a defendant is to be tried solely upon the specific charge specified in the indictment:

> "Rule 7(c) of the Federal Rules of Criminal Procedure provides that an indictment should contain 'a plain, concise, and definite written statement of the essential facts constituting the offense charged.' The rule reflects the oft-stated principle that an indictment is defective if it fails to apprise the

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* The indictment is reproduced in the appendix filed herein by the co-appellant Chan.

accused 'with reasonable certainty of the nature of the accusations against him.' [Footnote and citations omitted] The indictment here clearly failed to do so."

In Zeehandelaar, this Court further noted:

"An indictment drawn with reasonable certainty assures that the defendant will not be tried or convicted for an offense other than the one for which he was indicted by the grand jury, that the defendant will be able to prepare an adequate defense and to address himself to the relevant questions of fact and law, that the trial court will be able to determine that the jury's verdict rests on substantial evidence, that an appellate court's affirmance will not be for a crime other than the one for which defendant was convicted, and that the defendant will not face the prospect of being placed twice in jeopardy. See generally: Russell v. United States, 369 U.S. 749 (1962)." (498 F. 2d at 356, fn. 1).

We shall attempt to make increasingly clear to this Court, as the various arguments under this point are presented, that the government's presentation of a bouillabaise of proof and the Court's defective instructions to the jury so grievously departed from the dish ordered by the grand jury as to deprive the defendant of a trial with respect to the specific crime charged.

B. The Manner in Which the Issues were Presented and Preserved.

Prior to trial, both the defendant Chan and the defendant Lam moved in writing for a severance of Count II (Record on Appeal, Documents 4 and 7). The Court heard argument on the issue immediately prior to

trial (H. 9 et seq.). In addition, counsel for Lam argued, inter alia:

> "I object to any testimony going in at all about my client's involvement in any way with that second transaction, because I believe that such testimony, again, would be prejudicial to the determination of whether or not my client was guilty or not guilty of the first count." (H. 15)

During the course of the argument, the Court granted the severance, stating as follows:

> "***I think there is a risk of sufficient prejudice, which outweighs other considerations here, which could arise by trying these two counts together. Even though it may mean extra time, I am going to grant the severance." (H. 26-7).

When the government inquired as to whether, despite the severance, it could adduce proof as to the events upon which Count II was based, the Court replied, "If you mean to go up to May 1st, that is one thing, but to go up to May 30th, I think you are in effect attempting to try the second count." (H. 27)

Then, although noting that the government "is embarking on a very risky course" (H. 29) and expressing "considerable concern about the situation that I can see possibly arising here", the Court withdrew the grant of a severance and announced that it would reserve decision on the issue and might sever during the middle of the trial (A. 30, 32). For its part, the government announced that it was willing to test the issue on appeal (H. 29).

In a similar vein, the defense argued the problem of multiple conspiracies with respect to the May 30 transaction (H. 21) and with respect to the January 30 transaction (H. 124-130). The defense made crystal clear that it thought the conspiracy count of the indictment was addressed solely to the aborted alleged attempt to import heroin from Hong Kong and to possess and distribute that heroin. For that reason, as well as based upon the actual facts of the transactions in question, the defense argued that the January 30th and May 30th deliveries of heroin were distinct from the charged conspiracy (H. 15, et seq.).

At the trial, but prior to the opening statements, the defense pressed its claim that evidence of the January transaction should not be admitted since it was unrelated to and not charged within the conspiracy count of the indictment. The prosecutor admitted as much when he read to the Court from the sole mention in the grand jury minutes of anything that occurred in January:

> "***The fourth question asked to Police Officer Wright was:
>
> 'Q. In January of 1974 did Police Officer Mingo tell you that', pause, 'introduce you to a man by the name of Jim Lam?
>
> 'A. Yes, sir.'
>
> "That was the beginning of the conspiracy at that point.
>
> "I would point out in addition

> that the only person who testified before the grand jury was Police Officer Wright.
>
> "Police Officer Mingo, who was the person who was involved in these January transactions, did not testify before the grand jury, and that is why all the details about the January aspects of this conspiracy are not in the grand jury.
>
> "But I think quite clearly the grand jury was given factual information on which to base its indictment that the conspiracy started in January, 1974." (Tr. 30-31).

It was the government's contention, therefore, since the grand jury knew that one police officer introduced Lam to another police officer in January, this formed a predicate for the claim that the events of January - absolutely unknown to the grand jury - were part of the conspiracy charged in the indictment.

If the government wanted the grand jury to so charge, then it should have presented the evidence to the grand jury. As demonstrated by the trial proof, and contrary to the assertion of the prosecutor, Police Officer Wright did actually participate in the January 30 purchase (Tr. 580-5).

The trial court overruled the defense motion to exclude evidence of such other crimes (H. 32-3). Throughout the remainder of the trial, the defense continued to preserve the record with respect to these issues*. When the prosecutor, in his summation, sought

*H. 55, 163, 191, 210, 213, 500-1, 788, 1113-1120, 1315, 1321.

to expand the distribution aspect of the conspiracy to the January 30 and May 30 transactions, the defense quickly made clear that this was a misstatement of the charge of the indictment:

> "The indictment charges a conspiracy to import, and the exact language of the indictment is 'with intent to distribute said,' referring back to the importation, 'heroin within the United States." (H. 58)

At the conclusion of the government's case, the defense moved for a mistrial or, in the alternative, that the testimony be stricken with respect to the January 30 and May 30 transactions. It will be recalled that the January 30 transaction was one where the undercover officers purchased heroin from individuals (Sonny and Robert) to whom Lam had introduced them. There was no evidence that Lam ever possessed that heroin or in any way controlled the terms of sale or was present at the time of the sale. There was no evidence that the co-defendants Chan and Li had any knowledge or connection whatsoever with the transaction. It is, thus, not surprising that the prosecutor was moved to concede as follows:

> "Mr. Corriero's [Lam's counsel] first point is that the testimony concerning the transactions involving Sonny, Robert and James Lam should be stricken.
>
> "Let me say that initially these defendants were named as co-conspirators in this case [under other names in the bill of particulars]. I believe the government has proved that they were co-conspirators in the case, although I must admit, quite candidly, that the proof that these people conspired with the defendants

here is somewhat weaker than I had anticipated when we started off." (Tr. 1323; bracketed material added).

The government also conceded that there was no proof that the co-defendants Li and Chan engaged in any narcotics transactions with Sonny and Robert (Tr. 1331).

C. The References to Additional Other Crimes Not the Subject of Proof.

During the government's direct examination of Police Officer Wright, the prosecutor eventually came to the purchase which was made on May 30, 1974. By his questions, the prosecutor made clear that Wright had participated in more than one heroin purchase on that date:

> "Q. Detective Wright, directing your attention now to two days later, May 30, 1974, did you, actingin an undercover capacity, participate in the purchase of heroin.
>
> "A. Yes, sir.
>
> "Q. How many heroin purchases did you participate in on May 30, 1974?
>
> "MR. CORRIERO: If your Honor please, we are only talking about one transaction here. I am going to object to that question.
>
> "MR. TIMBERS: Your Honor, I will be glad to explain either from here or at the bench why I am asking the question." (Tr. 802)

At the bench, the prosecutor explained that the undercover officers also consummated a transaction on May 30, 1974 with the same people they had made a purchase from on January 30, 1974, but without the

knowledge of Lam or either of the other defendants. The Court prohibited the prosecution from eliciting such evidence (Tr. 803-7). Nevertheless, the implication of the prosecutor's questions was clear and the jury was left to believe that multiple purchases, presumably connected to these defendants, were made. Nothing could have eradicated that impression.

In his summation, the prosecutor argued to the jury as follows:

> "The government submits that the evidence you have heard shows that Jimmy Lam was a narcotics middleman who by using contacts he made in his travel business put people who want to buy narcotics together with people in Chinatown who sold heroin.
>
> "Sonny, Fat Man and Michael were Chinatown heroin sellers for whom Lam arranged heroin sales. Usually these sales were in the range of one to five pounds.
>
> "The defendant Francisco Li Ganoza was another seller for whom Lam arranged heroin sales.
>
> "Also, these sales were usually arranged -- [objection]" (Tr. 1617)

When counsel rose to object to these comments as not being based upon evidence in the record, the Court indicated that summations should not be interruped and objections should be made at a later time (Tr. 1617-18). Accordingly, he subsequently repeated the objection, and moved for a mistrial. The motion was denied (Tr. 1742-4).

D. The Trial Court's Refusal to Charge with Respect to Multiple Conspiracies.

The defendants adopted each others requests to charge. Request No. 17 in behalf of the defendant Li was that the Court charge with respect to multiple conspiracies.* The Court declined to charge on this issue, "because I don't believe there is any evidence on multiple conspiracies." (Tr. 1606) See also: Li Ganoza Request No. 24, which was also denied.

E. The Court's Refusal, in its Charge, to Pin the Conspiracy Count to the Hong Kong Importation.

In its charge to the jury, the trial court effectively charged the jury that it could predicate a conviction on the conspiracy count based upon the January 30th transaction in which the actual sellers were "Mike", "Robert", and "Sonny":

> "Now I have emphasized that in order for you to find that a conspiracy existed you must find an agreement by two or more persons. In considering

* "17. Considering the government's proof, you must ascertain whether there was a single continuing overall conspiracy or separate independent conspiracies with separate and disparate groups involved with no overall central purpose. Therefore, if you find separate conspiracies and that some other defendant belongs to one and not to the other, then there would be no proof of a single conspiracy charged in the first count of the indictment, and you should, therefore, return a verdict of not guilty as to all defendants under the conspiracy count." (Record on Appeal, Document No. 8, Court's Exhibit No. 1).

whether there was an agreement between two or more persons to violate the law you may consider not only the persons named in the indictment, but also the several other persons whose names you have heard mentioned during the course of the trial as being involved in the alleged scheme to violate the law.

"For your assistance I will read a list of the names. They are Chong Yin Hee, also known as Mike or Chris; Kim Chou Chan, also known as James; Lim King Sing also known as Robert or Fat Man or Shark Fish; Yeo Chin Nee, also known as Sonny; and then there were two others, John Doe, also known as Yuk Choi Chung's brother, and John Doe, also known as Francisco Li Ganoza's uncle.

"Thus, if you find from both the list of the defendants and the list that I have just read to you that any two or more of the persons agreed to violate the law, then you may find that there was a conspiracy. You are to draw no inference from the fact that some of the persons are named in the indictment and some are not." (Tr. 1762-3)

In its charge, the District Court also effectively charged the jury that guilt on the conspiracy count was not predicated upon the effort to import heroin from Hong Kong:

"Now, the indictment alleges that the conspiracy was to import, to distribute and to possess with intent to distribute heroin, which, as I have stated, is a Schedule I narcotic drug controlled substance. The government's proof may, but need not, establish all of these objectives of the conspiracy. If you find that the agreement had as its object any one of these unlawful activities, then you may be satisfied that the existence of the conspiracy is established." (Tr. 1763) [Emphasis added]

This charge was clearly at odds with the

position taken by the defense prior to and throughout the trial. At the conclusion of the charge, counsel took exception and concisely stated the manner in which the Court's charge constituted a variance of the specific conspiracy charged in the indictment:

> "MR. ROSENTHAL: I respectfully except to that portion of your Honor's charge practically in the beginning of the charge in which you said that the conspiracy was to import heroin and the distribution and possession to distribute heroin in the United States.
>
> "As I recall the indictment, it reverts back to the heroin that they were conspiring to import and the indictment specifically says 'heroin,' so that it is not a general charge of a conspiracy to possess and distribute heroin in the United States.
>
> "THE COURT: All right. Anything else? I think I have explained that to you earlier in one of our meetings.
>
> "MR. ROSENTHAL: I know. However, I believe that I should take exception to it, and I do respectfully do so.
>
> "THE COURT: Yes." (Tr. 1798-9).

F. The Court's Refusal to Charge on the Fraud Issue.

Throughout the trial, the defense sought to establish that either Lam was entrapped by the agents or Lam was just stringing the agents along with the hope of fraudulently persuading them to part with some money.

In his summation, the prosecutor made clear that this was an issue in the case:

> "***I anticipate that Mr. Corriero in his summation will tell you that when his client said the things that you heard on the tapes he didn't really mean what he was saying, but he was either trying to defraud the officers into giving him some money or, at another time, that he was scared of the officers.
>
> "Now, it is unclear to me exactly when Jimmy Lam is supposed to be defrauding and when he is supposed to be afraid of the officers, so I am going to save my arguments to what I anticipate Mr. Corriero's arguments will be until Mr. Corriero gives you his summation and I know exactly what he has to say." (Tr. 1623-4).

Throughout his summation, counsel for Lam made precisely such arguments (Tr. 1637-1657). Then, in rebuttal, the prosecutor dealt with the fraud issue at some length (Tr. 1732-8).

In its charge to the jury, the Court omitted any reference to the fraud defense. Instead, it gave the usual sorts of charges which, unless further explained, might well lead a jury to conclude that a fraudulent objective would satisfy the requirements of the conspiracy count.*

---

* Thus, at Tr. 1760, the Court charged the jury:

> "The gist of the crime of conspiracy is the unlawful combination or agreement to violate the law. Whether or not the persons charged in the indictment accomplished what it is alleged they conspired to do is immaterial to the question of their guilt or innocence."

And at Tr. 1763 the Court charged:

[footnote continued on following page]

Upon the completion of the Court's charge, counsel for Lam and the Court entered into the following colloquy wherein counsel requested that the Court instruct the jury that if Lam's intention during the Hong Kong venture was solely to defraud the officers and not to produce heroin, then he must be acquitted:

> "MR. CORRIERO: ***I believe your Honor indicated that if the jury concluded that there was an agreement and the agreement had as its purpose or end an illegal purpose they can conclude that particular element was met.
>
> "I would request that the Court indicate to the jury that it is not any illegal purpose that may have been the subject of a conspiracy, that in respect of this indictment --
>
> "THE COURT: But I spelled it out. This was just summing up in brief. Then when I came to each individual element I spelled out precisely what they had to find beyond a reasonable doubt. That is what I am sure you will agree would be the subject of a conspiracy and was the implication, heroin. That was all spelled out. That was merely the chapter heading that I was giving.

[footnote continued from previous page]

> "Once again, in this connection, it is not necessary for the government to prove the success of the conspiracy in order to show a violation of the statute. As a conspiracy is basically the agreement to violate the law, it may exist even though the final objectives were never accomplished. Thus, a conspiracy, if you so find it, may exist even though an importation or a distribution or a possession with intent to distribute was not accomplished."

"MR. CORRIERO: Will your Honor consider instructing the jury that if they conclude based on all the facts that the intention of the defendants was in reality to defraud the undercover agents --

"THE COURT: Listen, I put in a lot of stuff at your request, including entrapment, and if that is your defense, entrapment, how can you also say that what they were really doing was trying to entrap the agents.

"MR. CORRIERO: I believe I can have inconsistent defenses.

"THE COURT: Yes, but you won't get me charging that." (Tr. 1797-8)*

(H) The individual and cumulative effect of these errors require a reversal of the conviction.

In United States v. Sperling, 506 F. 2d 1323, 1340-1 (2d Cir., 1974), this Court said:

"In view of the frequency with which the single conspiracy versus multiple conspiracies claim is being raised on appeals before this Court ***we take this occasion to caution

---

* In fact, the defenses were not inconsistent. Officers can set out to entrap a target. The target, in turn, because of his lack of motivation or lack of ability to perform, can be lured by the enticements of the officers into doing something which falls somewhat short of the officers' expectations. In this case, taking their money, but not producing the product. Undercover agents must take a target as they find him. If he has a weakness for money, good times, association with "characters", travel or the like, and they wave such inducements before him, is the defendant to be faulted for only partially rising to the bait?

> the government with respect to future prosecutions that it may be unnecessarily exposing itself to reversal by continuing the indictment format reflected in this case. While it is obviously impractical and inefficient to try conspiracy cases one defendant at a time, it has become all too common for the government to bring indictments against a dozen or more defendants and endeavor to force as many of them as possible to trial in the same proceeding on the claim of a single conspiracy when the criminal acts could be more reasonably regarded as two or more conspiracies, perhaps with a link at the top. Little time was saved by the government having prosecuted the offenses here involved in one rather than two conspiracy trials. On the contrary, many serious problems were created at the trial level, including the inevitable debate about the single conspiracy charge, which can prove seriously detrimental to the government itself. We have already alluded to our problems at the appellate level, where we have had to comb through a voluminous record to give adequate consideration to the claims of eleven separate appellants."

It is respectfully submitted that, for the reasons already set forth, the proof at trial clearly revealed the existence of multiple conspiracies. The first conspiracy involved the January 30th transaction. The second conspiracy - the only one charged by the indictment - involved the alleged attempt to find a Hong Kong connection. The third conspiracy resulted in the May 30th transaction. For that reason, the trial judge should have granted the motion to sever Count II due to the overwhelming prejudice which that count cast upon the defendant Lam, although Lam was not charged in the count itself. Moreover, the Court should have precluded the government from adducing evidence with

respect to the two uncharged conspiracies. Having permitted the evidence to be adduced, the Court should have stricken it on motion of the defense or should have granted a mistrial.

Having committed error in failing to grant any of the aforesaid items of relief, the trial judge compounded that error by refusing a defense request that the jury be charged on the multiple conspiracy issue. As was held in United States v. Varelli, 407 F. 2d 735, (7th Cir., 1969):

> "Since the existence of multiple conspiracies is really a fact question as to the nature of the agreement, it is for the jury to decide whether there is one agreement or several. (United States v. Crosby, 294 F. 2d 928 [2d Cir., 1961]; Green v. United States, 333 F. 2d 788, 789 [5th Cir., 1964]; United States v. American Honda Motor Company, 273 F.Supp. 810 [N.D.Ill., 1967]).***"

The failure to so charge requires a reversal of the conviction.

Additional reasons exist as to why, for example, the January 30th transaction did not constitute criminal activity on the part of the defendant Lam. Since he exercised no dominion or control, actual or constructive, over the terms of that transaction, was not present when the transaction was consummated and never had the heroin in his possession, and did not according to the evidence receive any of the profits of the transaction, he cannot be charged with criminal responsibility for the transaction.

As this Court recently stated in United States v. Torres, 519 F. 2d 723 (2d Cir., 1975):

> "***...[M]embership in a conspiracy is not established by evidence of mere association with conspirators, United States v. Cirillo, 499 F. 2d 872, 884-85 (2d Cir., 1974) cert denied, 419 U.S. 1056 (1974), or by the fact that a defendant told a willing buyer how to make contact with a willing seller, United States v. Hysohion, 448 F. 2d 343, 347 (2d Cir., 1971).***" (519 F. 2d at 726)

See also: United States v. Thomas, 468 F. 2d 422, 425 (10th Cir., 1972); United States v. Steele, 469 F. 2d 165, 168-9 (10th Cir., 1972); United States v. Euphemia, 261 F. 2d 441 (2d Cir., 1958).

If the jury, particularly since it did not have the benefit of the instructions requested by the defense, predicated conspiratorial guilt upon the January 30th transaction, then the defendant was clearly wrongfully convicted. As the Supreme Court recently noted in United States v. Feola, - U.S. - , 95 S.Ct. 1255, 1265, 43 L.Ed. 2d 541 (1975):

> "Our decisions establish that in order to sustain a judgment of conviction on a charge of conspiracy to violate a Federal statute, the government must prove at least the degree of criminal intent necessary for the substantive offense itself."

* * *

For all of the above reasons, the judgment of conviction herein should be reversed.

That conclusion is all the more compelled by this Court's recent opinion in United States v. Bertolotti, - F. 2d - (November 10, 1975) slip sheet ops. at 6409. In Bertolotti, this Court stated:

> "When convictions have been obtained on the theory that all defendants were members of a single conspiracy although, in fact, the proof disclosed multiple conspiracies, the error of variance has been committed." [Citations omitted] (Slip sheet ops. at 6417)

In reversing the conviction in Bertolotti upon the ground that prejudicial multiple conspiracies were established, this Court further stated:

> "Our examination of the evidence reveals a sufficient basis for the jury to be satisfied beyond a reasonable doubt that each of the asserted transactions took place, but no evidence linking them together in a single overall conspiracy. [Citations omitted]. Indeed, the only common factor linking the transactions was the presence of Rossi and Coralluzzo. This type of nexus has never been held to be sufficient. [Citation omitted]. We find our description of the operation in Miley perfectly apt in the instant case. The operations centering around Rossi and Coralluzzo could hardly be attributed to any real organization, even a 'loosely knit' one. [Citation omitted]. There was no evidence to show that these two 'were conducting what could seriously be called a regular business on a steady basis.' The scope of the operation was defined only by Rossi's resourcefulness in devising new methods to make money.
>
> "It is clear to us that the government has merely merged several conspiracies for the sake of convenience. [Citation omitted]." (Slip sheet ops. at 6419).

In the present case, if any appearance of conspiracy was created - and it was not - then it was the undercover agents who created it. There is no showing that the defendant Lam engaged in any regular course of conduct other than that into which he was goaded by the agents.

The prejudice to Lam is manifest. Were it not for the government's proof of other crimes and were it not for the government's effort to merge those crimes into the conspiracy, the jury might well have, under proper instructions, credited Lam's defense.

POINT II

THE CONDUCT OF THE PROSECUTOR IN PRESENTING THE CASE AND IN HIS ARGUMENTS TO THE JURY DEPRIVED THE DEFENDANT OF A FAIR TRIAL AND OF HIS RIGHT TO CROSS-EXAMINE THE WITNESSES AGAINST HIM.

We have grouped under this point a variety of tactics engaged in by the prosecutor which, we contend, unfairly prejudiced the defense.

(A) In view of the pre-trial proceedings in which the Court had indicated that it would permit the government to adduce evidence covering a range of transactions not specifically charged in the indictment, the defense correctly anticipated a lengthy government case containing proof of "other crimes" which might well distract the jury from the specific charge of the indictment. The

government's twenty page opening enhanced that likelihood both by the nature of the events which the prosecutor chose to detail and by the broad brush strokes with which the prosecutor described the anticipated evidence.

When counsel for appellant Lam sought, in his opening statement, to focus the jury's attention upon the critical aspects of the anticipated evidence, the prosecutor repeatedly objected (Tr. 63, 69, id., 70, 71, 72, 73, 74). The entire opening of counsel for the defendant Lam extended from Tr. 59 to Tr. 77.

Not content with interrupting defense counsel's opening, the prosecutor voiced one of his objections as follows:

> "Objection. Your Honor, the government refrained from going into the details of all the conversations in this case. We easily could have given many details that are very incriminating." (Tr. 74; emphasis added).

The prosecutor thus, most improperly, made himself the first witness against the defendant.

(B) This course of conduct had earlier been indicated by the prosecutor's own opening statement where he conveyed to the jury the thrust of evidence which he did not intend to present:

> "I would like to make two comments about the tape recordings that you will be hearing in this case.
>
> "First of all, more than one hundred fifty conversations were recorded

during the investigation of this case. If all of these recordings were to be played during this trial you would probably be here until Christmas.

"Therefore, the government intends to play only ten to fifteen of these one hundred fifty recorded conversations.

"We believe that the recordings that we are going to play to you constitute a fair and correct sample of the conversations that took place.

[Objection by defense counsel and reprimand to the prosecutor by the Court].

"MR. TIMBERS [continuing]: In any case, if the defendants should disagree that what we are playing is an accurate sample, the government has made all the tapes available to the defendants to listen to and they have the right to play them to you on their own.

[Objection by defense counsel and reprimand by the Court] (Tr. 49-50).

By these comments, the prosecutor conveyed to the jury the impression that the government had ample corroborative evidence which the jury would not hear. He also directly challenged the defense to produce evidence when they clearly had no obligation to do so. This was nothing less than a reprehensible sand-bagging stunt.

Finally, in his opening, and despite the extensive pre-trial discussion of the subject, the prosecutor specifically and intentionally charged the defendant Lam with a crime not charged in the indictment:

"First of all, from my description of the May 30th sale of a pound and a half of heroin it may have occurred to

> some of you that although the indictment only charges Francisco Li Ganoza with making that sale, the government could have also charged Jimmy Lam." (Tr. 52)

With respect to each of the above noted comments, the defense immediately took objection. Then, in the absence of the jury, a motion was made for a mistrial (Tr. 55-6). The motion was denied (Tr. 58). During its charge, the Court attempted to remedy the prosecutor's comments (Tr. 1792); however, we respectfully urge that the error was not cured. See also: Court's comments at Tr. 116 .

(C) The defendant Chan testified in his own behalf. It appears that following his arrest he made statements to an Assistant United States Attorney (Mr. Nesland) and to a DEA Agent (Mr. Gartland).* Despite the fact that the prosecutor had been forewarned by the defense and by the Court against asking Chan whether he made any post-arrest statements implicating Lam (Tr. 1530-1531), the prosecutor nevertheless commenced questioning Chan as follows:

---

* Following the trial, the Court conducted a hearing with respect to the circumstances under which certain statements were made by Chan. (Tr. 1855 et seq.). The minutes of that hearing, although available to counsel, are sealed. Since it is not necessary to our argument, we will not discuss the circumstances under which Chan made the aforesaid statements. Suffice it to say, it is clear that the statements to Agent Gartland should not have been utilized at trial.

"Q. When you were first interviewed by Mr. Nesland did you, in fact, tell him that you had attended two meetings with Jimmy Lam and the undercover agents in New York?" (Tr. 1533)

The prosecutor apologized for violating the Court's prior directive, and the Court told him to "explain it to the appellate court." (Tr. 1535) A motion for a mistrial was denied (Tr. 1536).

(D) Not having learned his lesson with the above noted incidents, the prosecutor thereafter embarked upon an even more prejudicial course of similar conduct. Up to that point in the case, there had been no reference made to anyone by the name of "Han Ng". The prosecutor cross-examined Chan as follows:

"Q. Did Jimmy Lam tell you that a person named Han Ng was to be his source of supply for the heroin?" (Tr. 1551).

It turns out that the prosecutor's source of information for this question was a statement made under privileged circumstances (See: fn. at p. 34 supra) and had never previously been provided to defense counsel. Moreover, it specifically violated the directives previously given to the prosecutor by the Court (See: Tr. 1551-61, 1611). The prosecutor's conduct prompted the Court to comment:

"I am sorry I ever got involved in this case. Let's go ahead. The objection is overruled. We have gone this far." (Tr. 1555).

A motion for a mistrial was denied.

The prosecutor then proceeded upon the same course (Tr. 1555-7), to the great consternation of the Court (Tr. 1558). Indeed, the Court went on to comment: "It seems to me we have wasted about four weeks. But, at any rate, go ahead." (Tr. 1559) The cat being out of the bag, and the Court having reconciled itself to its fate, the prosecutor was permitted to ask further questions along this vein (Tr. 1560-1). Upon a repeated motion for a mistrial, the Court again expressed its consternation and disagreement with the prosecutor, expressing its belief in the prejudicial nature of the statement and its despair at curing the error (Tr. 1563-4).

Most significantly, when the prosecutor asked Chan whether he had told Agent Gartland "after you were arrested that in Hong Kong Jimmy Lam had been dealing with two different groups that were supplying heroin?", Chan refused to answer. At first, the Court told him he had to answer (Tr. 1560). However, after a bench conference, wherein the privileged nature of Chan's conversations was revealed, the Court stated, inter alia, "The witness had enough sense to refuse to answer." The Court further noted:

> "If this was the second or third day I wouldn't hesitate to grant a mistrial."

and proceeded to deny a motion for a mistrial (Tr. 1569). It then instructed the jury "to wipe any answer or any

of those questions out of your minds, to the extent that you can do it -- I know it's difficult, but you are going to have to do it -- because those statements are not binding upon any other defendant in this case." (Tr. 1571). The Court gave an additional such instruction in its charge (Tr. 1768).

It is respectfully submitted that the entire course of conduct with respect to Chan's post-arrest statements intensely prejudiced the defendant Lam. The jury could not help but know that Chan had made incriminating statements concerning Lam. Short of granting a mistrial, nothing could have prevented the jury from indulging its imagination as to the nature and extent of those incriminating statements. Thus, the defendant Lam again was sand-bagged into a situation where evidence was effectively placed before the jury without a proper opportunity to cross-examine.

(E) In his summation, the prosecutor returned to a theme for which the Court had roundly criticized him in his opening statement - his failure not to play all of the recorded tapes. This time he attempted to veil it under the guise of a good-natured, off-the-cuff statement:

> "I tried to make the summation I am going to give you this morning short, but I must warn you that I also tried to make the trial short by not playing all the tapes that were recorded." (Tr. 1615)

* * *

It is respectfully submitted that the various tactics described supra constituted violations of prosecutorial standards enunciated by this Court in United States v. Drummond, 481 F. 2d 62 (2d Cir., 1973); United States v. Bivona, 487 F. 2d 443 (2d Cir., 1973); United States v. White, 486 F. 2d 204 (2d Cir., 1973); United States v. LaSorsa, 480 F. 2d 522 (2d Cir., 1973).

POINT III

THE COURT IMPROPERLY RECEIVED IN EVIDENCE THE TESTIMONY OF AN AGENT WHO CLAIMED THAT HE RECEIVED A SAMPLE OF HEROIN IN HONG KONG AND THAT HIS TEST OF THAT SAMPLE SHOWED IT TO BE HEROIN. THE SAMPLE WAS NOT PRODUCED IN COURT OR OTHERWISE MADE AVAILABLE TO THE DEFENSE, AND THE AGENT WAS UNQUALIFIED TO TESTIFY AS TO THE RELIABILITY OF THE TEST OR THE INTEGRITY OF THE PROCEDURE HE FOLLOWED.

According to Agent Wright, while he and Mingo were in Hong Kong on the evening of April 21, 1974, Lam gave them a small quantity of a brown rock substance, contained in a Kent cigarette wrapper and claimed that this was a sample of the heroin he was attempting to obtain. Over objection, Wright was permitted to testify:

> "I had a chemical -- which is a marquis reagent, that when it is mixed with a substance or with heroin will turn purple if heroin is present." (Tr. 670).

Counsel for the defendant Lam objected upon the ground that the substance in question had not been made available to the defense and upon the further ground that the agent was not qualified to testify with respect to the nature of the substance (Tr. 670-1).

The prosecutor responded that at the time of trial the alleged sample was in Hong Kong and not available for the defense to examine (Tr. 672). The defense retorted that, in the absence of the sample, it was rendered powerless to effectively cross-examine concerning the truth and accuracy of the officer's testimony. Over these objections, the Court permitted the prosecutor to explain what he understood the marquis reagent test to be and that when, as here, it produces a purple color, then "it indicates that heroin is present in the substance." (Tr. 675). The jury was thus treated to a scene from the film, "French Connection".

On cross-examination, Wright admitted that no other tests were performed to ascertain the identity of the substance, that he had no knowledge of the chemical nature of the test, that he is not a chemist, that the matter was really "above my head", and that he had no knowledge with respect to what other substances right turn the same color when subjected to the test (Tr. 854-858).

It is respectfully submitted that the admission of Officer Wright's testimony on this subject constituted serious error which grossly prejudiced the defendant.

The test in question is, in fact, quite unreliable. See: Bernheim, Defense of Narcotics Cases (Matthew Bender, 1975 revision), § 402, and authorities there cited.

As this Court stated in United States v. Kelly, 420 F. 2d 26, 28 (2d Cir., 1969), with respect to a cocaine test, "If the test was indeed unreliable at this stage, then it should not have been given to the jury." In Kelly, this Court reversed because the defense had not been given a fair opportunity to test the accuracy of the test in question. Precisely the same situation existed here. Not only was this sprung on the defense in the midst of trial, but the actual alleged heroin sample remained on the other side of the world. Moreover, efforts to probe Wright's knowledge with respect to the test revealed that he knew nothing except that he believed that a certain color revealed the presence of heroin. Thus, the defense was triply confounded. It could not probe the general reliability of the test; it could not probe the adequacy of the procedures followed by Wright; and, most serious of all, it could not conduct an independent test of the alleged sample.

Since the defendant Lam's defense was, in major part, predicated upon the claim that he was bluffing and giving the alleged pimps a run for their money, this alleged sample did serious damage to that defense.

We do not contend that the agent could not have testified that Lam delivered a substance which Lam

claimed to be a small sample of heroin. Delivery of some other substance under the guise of heroin would certainly have been consistent with a fraudulent intent on the part of Lam. Our claim of error is predicated, instead, upon those aspects of Wright's testimony which must have authenticated the claim in the eyes of the jury.

By his written pre-trial motions, the defendant Lam had made clear his desire for information concerning the chemical composition of the alleged sample and reports of any scientific tests and experiments made in connection with this case (See: Record on Appeal, Document No. 22, Requests 1g and 2a). Thus alerted, the government, at least, should have made the alleged sample available in New York at the time of trial or earlier. Certainly, some procedure could have been worked out. As it turned out, the defendant was effectively deprived of any opportunity to defend himself on this issue.

POINT IV

THE COURT WRONGFULLY PRECLUDED THE DEFENDANT LAM FROM INTRODUCING INTO EVIDENCE A GOVERNMENT MEMORANDUM WHICH ESTABLISHED THAT, WHILE IN HONG KONG, LAM WAS FOLLOWED AND WAS NOT OBSERVED TO MEET WITH ANY NARCOTICS DEALERS.

As discussed supra, under Point II, at pp. 34-6, the government improperly sought to cross-examine the co-defendant Chan with respect to whether Lam had

previously admitted meeting with narcotics dealers during the trip to Hong Kong. During colloquy with respect to that cross-examination, counsel for the defendant Lam advised the Court as follows:

> "Well, in any event, if your Honor please, I would only point out to your Honor that the Telexes received from Hong Kong by the Hong Kong authorities reflect that Mr. Lam never spoke to any of the people, never spoke to anyone who was identified as a known narcotics dealer, and I believe Mr. Timbers has just now opened the door with respect to that, and I think I am entitled to bring it out before this jury because his whole line of questioning seems to be that these people, these names that he mentioned, are people who are involved in narcotics, and that is the inference he is really asking this witness to draw." (Tr. 1554-5).

Examination of Chan continued through to Tr. 1578 and the defense rested. The prosecution then called Officer Wright in rebuttal (Tr. 1585-1599), and the government rested. No indication was given that the defense had finally rested.

Thereafter, during a discussion of the requests to charge, counsel for the defendant Lam advised the Court as follows:

> "MR. CORRIERO: If your Honor please, I wanted to offer in surrebuttal, surrebuttal to Mr. Timbers' cross-examination of the defendant Chan, the Telex that indicated that the defendants had been followed in Hong Kong and they were not observed in contact with any known narcotics dealers, and I would make that offer.
>
> "THE COURT: Well, as you know, we have all rested.

"MR. CORRIERO: If your Honor please, when the government completed I had in mind to make this offer yesterday. I said that was the defendant's case. I didn't say that I rested. Maybe that is the impression that was conveyed. I certainly meant to make that offer yesterday.

"THE COURT: Well, you will have to look at the record.

"The request will be denied." (Tr. 1609)

Even if the Court had been correct in believing that the defense had rested, it was certainly an abuse of discretion, given the importance of the evidence and the lack of inconvenience, for the Court to deny this defense request. Throughout the trial, numerous similar considerations had been extended to the prosecution (Tr. 560, 1086-1089).

It is respectfully urged that this Court reverse the judgment of conviction herein upon the ground that the defendant Lam, as a matter of right or as a matter of the proper exercise of judicial discretion, should have been permitted to adduce the evidence in question.

POINT V

THE APPELLANT LAM ADOPTS ALL APPLICABLE ARGUMENTS RAISED BY THE BRIEFS OF THE CO-APPELLANTS.

Conclusion

For all of the above reasons, the judgment of conviction should be reversed.

Respectfully submitted,

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